No. 3696

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CHANG SIM and CHANG YET,
Appellants,

vs.

EDWARD WHITE, as Commissioner of Immigration for the Port of San Francisco,
Appellee.

APPELLEE'S REPLY BRIEF

JOHN T. WILLIAMS,
United States Attorney,

BEN F. GEIS,
Assistant United States Attorney.

Neal, Stratford & Kerr, S. F. 16773

No. 3696

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CHANG SIM and CHANG YET,
Appellants,

vs.

EDWARD WHITE, as Commissioner of Immigration for the Port of San Francisco,
Appellee.

APPELLEE'S REPLY BRIEF

STATEMENT OF FACTS.

Chang Sim and Chang Yet, the appellants herein, are applicants for admission into the United States as citizens thereof, claiming to be the foreign-born sons of C. Waitong, whose citizenship is conceded.

Both applicants were given hearings before a Board of Special Inquiry and their applications for admission denied. From said denial an appeal was taken to the Secretary of Labor, where said appeal was dismissed and the applicants ordered deported.

Thereafter Petition for Writ of Habeas Corpus (Tr. p. 2) and Order to Show Cause (Tr. p. 9)

was filed, to which the respondent interposed a demurrer (Tr. p. 11), which said demurrer was sustained and petition denied (Tr. p. 13).

ARGUMENT.

It is alleged in the petition herein that the detained were deprived of the full and fair hearing and consideration of their cases to which they were entitled under the statutes. Second, that the action of the Board of Special Inquiry and the Secretary of labor was and is in excess of the authority committed to them by the statutes and the rules and regulations promulgated thereunder.

AS TO UNFAIRNESS.

Were the hearings in these cases manifestly unfair?

The appellant Chang Sim arrived at the Port of San Francisco on the S.S. "Korea Maru", July 24, 1919, and thereupon made application to enter the United States as a citizen thereof, claiming to be the foreign-born son of C. Waitong (Exhibit A, p. 89). In support of his application there was filed the affidavit of the alleged father, bearing the photograph of the said C. Waitong and the applicant Chang Sim, which said affidavit on the reverse side thereof bears the stamp and seal of the Consul General of the United States at Hongkong (Exhibit A, p. 2). There was also filed the affidavit of an identifying witness Wong Sing Chong (Exhibit A, p. 1).

As the alleged father and witness lived in Fresno, California, and it was therefore inconvenient for them to appear at Angel Island for examination before a Board of Special Inquiry, it was stipulated and agreed that their testimony might be taken by a single inspector and that the evidence so obtained might be presented to the Board of Special Inquiry for its consideration and made a part of the record. (Exhibit A, pp. 6 and 5).

Thereafter, to wit, August 14, 1919, the testimony of the alleged father Chang Waitong (Exhibit A, pp. 20 and 11) and the witness Wong Sing Chong (Exhibit A, p. 16) was taken and transcribed by Inspector Moore at Fresno, California, and forwarded to the Commissioner of Immigration at San Francisco, together with his report, and the same made a part of the record. (Exhibit A, pp. 22, 23).

Thereafter, to wit, August 25, 1919, the testimony of appellant Chang Sim was taken before a Board of Special Inquiry (Exhibit A, p. 32) and said Board voted that action be deferred for further examination of the alleged father at Fresno, relative to an affidavit filed by him in 1914 (Exhibit B, p. 2) and for the purpose of securing the files of the Honolulu office relating to the alleged father (Exhibit A, p. 25).

Thereafter, to wit, September 11, 1919, a further examination of the alleged father was made by Inspector Moore at Fresno, whose report and a copy

of the testimony was made a part of the record. (Exhibit A, pp. 40, 39).

Thereafter, to wit, September 29, 1919, Chang Sim was again before the Board of Special Inquiry at which time it was voted to defer action for further statement of the alleged father (Exhibit A, pp. 47, 46) relative to the endorsement on the back of copy of naturalization certificate showing his landing at Manila, P. I., on the "S. S. Tean", June 22, 1906, as a citizen of the United States, said endorsement showing that he was accompanied by wife and family (Exhibit C, pp. 11, 12).

Thereafter, to wit, October 6, 1919, the alleged father was further examined at Fresno by Inspector Moore, whose report and transcript of testimony is made a part of the record (Exhibit A, pp. 54, 53).

Thereafter, to wit, October 15, 1919, the Board, after considering the additional testimony of the alleged father, voted that action in the case be further delayed for reports from Honolulu and Manila, and recommended that the applicant be paroled to counsel pending receipt of said reports. (Exhibit A, p. 56).

Chang Sim was thereafter paroled to attorneys Edsell & Dye (Exhibit A, pp. 58, 89).

Thereafter, report of Inspector Farmer of Honolulu (Exhibit A, p. 67), together with the testimony of Chang Woung Ming (Exhibit A, p. 66), was received and made a part of the record.

Thereafter a copy of Chinese Board Report No. 594 "S. S. Tean", June 22, 1906, was received under cover of letter from the Insular Collector of Customs at Manila, dated December 2, 1919, and the same made a part of the record (Exhibit C, pp. 1 to 10).

Thereafter, to wit, January 26, 1920, the Board of Special Inquiry, after a careful consideration of all the evidence in the case, was not satisfied that the relationship claimed existed and voted to defer for ten days for further evidence (Exhibit A, pp. 70, 71, 72 and 73), and the attorneys of record were so notified in writing. (Exhibit A, p. 74).

Thereafter, said attorneys advised the Commissioner of Immigration that they had no further evidence to offer and asked that the case proceed to final conclusion by the Board. (Exhibit A, p. 75).

Thereafter, to wit, February 10, 1920, the Board voted to exclude the applicant on the ground "that the relationship alleged does not exist," (Exhibit A, p. 77), and the attorneys of record were notified of the Board's excluding decision (Exhibit A, p. 79) and thereupon filed notice of appeal (Exhibit A, p. 80).

Thereafter, attorneys of record were given full opportunity to review the entire record together with exhibits, as appears from their receipt therefor. (Exhibit A, p. 86).

The appellant Chang Yet arrived at the Port of

San Francisco on the S. S. "Nanking" November 30, 1919, and thereupon made application to enter the United States as a citizen thereof, claiming to be the foreign-born son of C. Wai Tong, whose citizenship is conceded. (Exhibit A, p. 127.)

In support of his said application he filed the affidavit of his alleged father bearing the photographs of said C. Wai Tong and the applicant. There was also filed the affidavits of Wong Sing Chong and Chang Sim, the other applicant herein (Exhibit A, pp. 91, 94).

At the request of applicant's attorneys the record was forwarded to Fresno, California, for the taking of the testimony of said witnesses (Exhibit A, p. 95).

Thereafter, to wit, December 19, 1919, the testimony of Chang Wai Tong (Exhibit A, p. 106), Chang Sim (Exhibit A, p. 104) and Wong Sing Chong (Exhibit A, p. 99) was taken at Fresno by Inspector Moore and together with his report (Exhibit A, p. 107) was made a part of the record herein.

Thereafter, to wit, February 3 and 4, 1920, the testimony of the applicant was taken before a Board of Special Inquiry (Exhibit A, pp. 115, 119), and at the conculsion of said hearing the said Board voted to defer action for ten days to allow the production of additional evidence on the question of relationship (Exhibit A, p. 116), and the attorneys of record were so notified in writing (Exhibit A, p. 121).

On February 6, 1920, said attorneys notified the

Commissioner of Immigration that they had no further evidence to offer and asked "that the case proceed to final conclusion by the Board promptly." (Exhibit A, p. 122.)

Thereafter, to wit, February 10, 1920, the Board of Special Inquiry, after a careful consideration of all the evidence adduced, voted to exclude the applicant and he was so notified (Exhibit A, p. 123).

From said excluding decision an appeal was taken to the Secretary of Labor (Exhibit A, p. 124), and the attorneys of record were given full opportunity to review the entire record in the case, including exhibits, as appears from their receipt therefor. (Exhibit A, p. 126.)

Thereafter, to wit, March 29, 1920, the records in both of these cases were forwarded to the Secretary of Labor, Washington, D. C., on appeal (Exhibit A, p. 128). During the pendency of these cases before the Department the applicants were represented by Messrs. Ralston & Hott, attorneys at law (Exhibit A, pp. 129, 130), who filed a brief in their behalf (Exhibit A, p. 142) together with an additional affidavit of the alleged father C. Wai Tong (Exhibit A, p. 140). The reasons for dismissing the appeal are fully set out in the memorandum prepared for the Acting Secretary at pages 135, 136 and 145 of Respondent's Exhibit A, and the Court's attention is respectfully called to said memorandum.

We believe and confidently urge that an inspection of the records in this case will disclose that the alle-

gation in the petition that the conduct of the hearings in these cases was or is unfair is not supported by the facts disclosed by said records. But, on the contrary, the records show that every jurisdictional step necessary to a fair though summary hearing was taken. An opportunity was afforded for the production of any and all witnesses, or other evidence, and all witnesses so produced were fully and fairly heard.

The petition herein does not show nor does an inspection of the immigration record disclose wherein petitioners were denied any substantial right to which they were entitled either under the laws or the rules and regulations in such cases made and provided. It is now well settled that in the absence of such a showing the petition should be denied. *Chin Yow v. United States,* 208 U. S. 8. In this case the Court said:

> "If the petitioner was not denied a fair opportunity to produce the evidence that he desired, or a fair though summary hearing, the case can proceed no farther. These facts are the foundation of the jurisdiction of the District Court, if it has any jurisdiction at all. It must not be supposed that the mere allegation of the facts open the merits of the case, whether those facts are proved or not. And by way of caution, we may add, that jurisdiction would not be established simply by proving that the Commissioner and the Department of Commerce and Labor did not accept certain sworn statements as true, even though no contrary or impeaching testimony was adduced."

And in the more recent decision of this Court in the case of *Jeung Bock Hon v. White,* 258 Fed. 23, the Court, speaking through his Honor Morrow, C. J., held as follows:

> "We can not say that the proceedings were manifestly unfair or that the actions of the executive officers were such as to prevent a fair investigation or that there was a manifest abuse of the discretion committed to them by the statute. In such cases, the order of the executive officers within the authority of the statute is final."

AS TO ABUSE OF DISCRETION

Does ~~not~~ an inspection of the immigration records herein disclose a manifest abuse of discretion on the part of the Board of Special Inquiry or the Secretary of Labor?

During the examination of the alleged father C. Wai Tong at Fresno, August 14, 1909, he was asked:

> Q. Have you any documental evidence to support your claim of naturalization in the United States?
>
> A. Yes, Sir.
>
> (Presents certificate No. 711 issued by Immigration officer in charge, Honolulu, Hawaii, dated Jan. 17, 1911, to C. Wai Tong (Chang Hung Pui) age 55 yrs. naturalized citizen. Description and photograph tally with present holder. Endorsed and returned.)

Presents Record of Naturalization, Dept. of Interior, The Hawaiian Kingdom, dated July 19, 1892, signed C. N. Spencer, Minister of the Interior. Attached to record marked Exhibit 'A'. Presents certificate of registration of American Citizen, dated Aug. 3, 1907, signed Stuart J. Fuller, Vice and Deputy Consul Gen'l, Hongkong, China, showing registration of applicant's name on this document as a son of registrant. Attached to record and marked exhibit 'B' (Presents certificates of naturalization signed by Henry E. Cooper, Secretary of the Territory of Hawaii, dated Honolulu, Dec. 14th, 1900. Photograph attached is a correct likeness of the witness, Chang Wai Tong. Attached to record and marked exhibit 'C'. Note. Witness requests that exhibits A. B and C be returned to him when they have served their purpose.)

The documentary evidence submitted by the witness will be found in respondent's Exhibit C herein, as follows:

Exhibit "A", Record of Naturalization, page 14,

Exhibit "B", Certificate of Registration, page 13,

Exhibit "C", Certified copy of Certificate of Naturalization, pages 12 and 11.

The last named exhibit bears the following endorsement on the face thereof:

"Landed at Manila, P. I.
Per S. S. "Tean"
June 22, 1906,
As a citizen of the United States of America
Chinese Board Report No. 594."

And on the reverse side of the second page of said exhibit (Exhibit C, p. 11) appears the following endorsement:

"Exhibit 14
Chinese Board Report
No. 594
With wife and family
Cases 15, 16, 17 and 18."

This last mentioned endorsement was called to the attention of the witness October 6, 1919, and he was asked to explain the same.

Q. You certify that you were the passenger referred to by report No. 594, of the Chinese Board at Manila?

A. Yes.

Q. On the reverse side of this certificate your attention is invited to the stamp and notation, marked Exhibit 14, Chinese Board report, No. 594, which states that the passenger referred to is accompanied by "wife and family" cases 15, 16, 17 and 18? In view of the fact that you have positively asserted that you were traveling alone on that trip, what have you to state relative to this documental evidence that your wife and two children accompanied you?

A. As I said, I was traveling alone, but after leaving Hongkong, I made the acquaintance of three Chinese actresses who were on the steamer going to Manila. They had an engagement there to appear for two months at a Chinese theatre in Manila. The purser of the ship either of his

own accord, or at the suggestion of these actresses, and without my permission or knowledge, put their names on the manifest as my wife and two daughters. They were in fact a mother and her two daughters, all actresses, but I did not know anything about what was going on until after we arrived at Manila and I was surprised to hear them tell the Chinese Board that I was their husband and father. I did not want to embarrass them by saying that they were nothing to me and allowed the deception to go. They were entitled to admission as actresses, but they feared they might be held up until they were investigated to determine whether they were bad women and for that reason wanted to appear as my wife and daughters. They were admitted, and played at the theatre for two months in Manila and then returned immediately to China. No harm was done to anyone, and I did not feel that I was violating any law by allowing them to tell that they were my wife and daughters. I saw them several times afterwards at the theatre where they were playing and told them that they might have gotten me in trouble by saying they were my wife and daughters. They said that they had missed the last steamer and they had to be at the theatre the next day after they were admitted and had their admission been delayed they would have been violating their contract. They were highly respectable women, but three women traveling alone in the business they were in might be under suspicion of being immoral persons, and they simply wanted the protection of appearing as my wife and daughters.

Q. Did you know these women prior to leaving Hongkong?

A. No, never saw them that I know of before I saw them on the steamer some hours out from Hongkong.

Q. Was there any monetary consideration for the part you played in their admission to the Philippine Islands from China?

A. No.

Q. Were they Chinese women and of the Chinese race?

A. Yes.

Q. Did you make a statement to the Chinese Board at Manila at the time of your examination that they were your wife and daughters?

A. No, but I was in the room when they told that to the inspectors.

Q. Did you make any effort to apprize the authorities that they were imposters and not members of your family?

A. No. I said nothing, I did not want to make any trouble for them.

In the meantime the Collector of Customs at Manila, P. I., was requested to furnish all records pertaining to the landing of said C. Wai Tong at Manila in 1906 (Exhibit A, p. 59).

In response the Insular Collector of Customs at Manila, under cover of his letter of December 2, 1919, forwarded to the Commissioner of Immigration a copy of the complete record of the investi-

gation made by the Board of Special Inquiry which landed these persons. (Exhibit C, pp. 1 to 10.)

While the witness now claims that he did not answer any questions at that time but was merely a passive participant in those proceedings, the record shows that he not only was a witness in behalf of the four women landed as his wife and daughters, but that the alleged wife and one Charles Chong, a theatrical manager, also testified as to the family relationship.

> "That, in the examination of Chang Wai Tong, age 43, we find that he is coming from Canton. He presents a certificate of residence No. 403, issued by the Collector of Internal Revenue, District of Hawaii, dated February 14, 1901, to Chang Wai Tong, a merchant, residing at Nunana Street, Honolulu. He further presents a copy of a record of naturalization, representing that one Chang Wai Tong, having made application in due form to the Minister of the Interior, was admitted and declared to be a citizen of the Hawaiian Kingdom on July 19, 1892. Attached to said copy, there is a certificate signed by the Secretary of the Territory of Hawaii, dated December 14, 1900, representing that the aforesaid copy of the record of naturalization of Chang Wai Tong is a true and correct copy of same, as shown by the records of his office. Said Chang Wai Tong, states that he is the same identical Chang Wai Tong mentioned and described in the aforesaid documents, and that he is now coming to Manila for the purpose of

assisting in the management of the aforesaid theatrical company.

"We decide that the said Chang Wai Tong is a citizen of the United States, and we, therefore, recommend that he be permitted to land.

"15, 16, 17, and 18. That, in the examination of Chao Ng, female, age 34; Chang Fong, female, age 18; Chang Chee, female, age 14, and Chang Cao, female, age 9, we find that they are coming from Canton, in company with the aforesaid Chang Wai Tong, who claims them as his legitimate wife and minor children respectively. They present no papers. Said Chao Ng states that she is the wife of the said Chang Wai Tong, and that she is an actress by occupation. She further states that the said girls, Chang Chee and Chang Cao, are her daughters, and the legitimate minor children of said Chang Wai Tong. She also states that the said Chang Fong is her stepdaughter, and the legitimate minor child of the said Chang Wai Tong, her husband, by his first wife. Said Chan Wai Tong testifies that the said Chao Ng is his legitimate wife; that the said Chang Fong is his legitimate daughter by his first wife, now deceased, and that the said Chang Chee and Chang Cao are his legitimate minor children by his second wife, the aforesaid Chao Ng. He further testifies that all of his family will take part in the aforementioned Chinese theatrical company. Charles A. Chong, manager of the "Nai Chu Cuan' theatrical company, age 25, No. 2 Calle Ugalde, testifies that he has been acquainted with the said Chang Wai Tong for the past twenty years; that the said Chang Fong is the

legitimate daughter of the said Chang Wai Tong by his first wife, now deceased, and that the said Chao Ng, who has been married to the said Chang Wai Tong for the past sixteen years, is the only legitimate living wife of the said Chang Wai Tong, and that the said girls, Chang Chee and Chang Cao are their legitimate minor children.

"We decide that the said Chao Ng is the legitimate wife of the said Chang Wai Tong, and that the said girls, Chang Fong, Chang Chee, and Chang Cao, are their legitimate minor children, and that the said Chang Wai Tong is a citizen of the United States, and we, therefore, recommend that they be permitted to land as the legitimate wife and minor children of a citizen of the United States."

C. Wai Tong now claims that he has been married twice first to Jow Shee February 26, 1876, who died about a year later leaving no children; that he was married to Leong Shee February 17, 1880, by whom he had three boys and one girl, Chang Shee; that the daughter is dead and gives the names, dates and places of the sons' births as follows:

Chang Yat, born KS 13-11-24 (Jan. 7, 1888) in China.

Chang Sim, born KS 20-8-2 (September 1, 1894), in China.

Chang Mee, born KS 30-1-9 (February 28, 1904), in China. (Exhibit A, p. 19.)

We first find this witness applying for admission at Manila with a women and three Chinese girls,

who it was there claimed were his lawful wife and daughters. He is now attempting to bring into the United States the appellants herein and tells altogether a different story concerning his marriage and his famliy. Here we have positive contradictions in the testimony of the witness in respect to facts of time, place and relationship, concerning which the witness can not be presumed to be mistaken and which appear to have been deliberately, knowingly and falsely made with intent to deceive.

No reasonable or satisfactory explanation has been offered, although ample opportunity was afforded the witness to do so, he having been confronted with all of his previous statements.

In such a case as this we believe that the rule *"falsus in uno, falsus in omnibus"* should be applied.

In the case of *The Santissima Trinidad and The St. Ander* (7 Wheat. 283; 5 L. ed. 454-468) the United States Supreme Court, speaking through his Honor, Justice Story, says:

> "It has been said that if witnesses concur in proof of a material fact, they ought to be believed in respect to that fact, whatever may be the other contradictions in their testimony. That position may be true under circumstances; but it is a doctrine which can be received only under many qualifications, and with great caution. If the circumstances respecting which the testimony is discordant be immaterial, and of

such a nature that mistakes may easily exist, and be accounted for in a manner consistent with the utmost good faith and probability, there is much reason for indulging the belief that the discrepancies arise from the infirmity of the human mind, rather than from deliberate error. But where the party speaks to a fact in respect to which he cannot be presumed liable to mistake, as in relation to the country of his birth, or his being in a vessel on a particular voyage, or living in a particular place, if the fact turn out otherwise, it is extremely difficult to exempt him from the charge of deliberate falsehood; and courts of justice, under such circumstances, are bound, upon principles of law, and morality and justice, to apply the maxim '*falsus in uno, falsus in omnibus*'. What ground of judicial belief can there be left, when the party has shown such gross insensibility to the difference between right and wrong, between truth and falsehood? The contradictions in the testimony of the witnesses of the libelants have been exposed at the bar with great force and accuracy; that they are so numerous that, in ordinary cases, no court of justice could venture to rely on it without danger of being betrayed into the grossest errors."

Citizenship is a priceless heritage which is not to be bestowed upon one seeking to enter the United States for the first time without some competent and convincing proof of that fact. Something more than a mere declaration of citizenship should be required. Were the Board of Special Inquiry, and the Secretary of Labor compelled to accept such

testimony as being satisfactory? Is the evidence so positive or clear as to carry conviction to an unprejudiced mind? Does it not bear the earmarks of suspicion as to its truth? These questions are best answered by the opinion of this court in the case of *Lee Sing Far vs. United States,* 94 Fed. 834, wherein the court, speaking through his Honor, Hawley, District Judge, pages 836 and 837, says:

> "The question which we are called upon to decide is not whether there was any evidence tending to establish the fact that appellant was born in the United States, but is whether the evidence is so clear and satisfactory upon that point as to authorize this court to say that the court erred in refusing her to land, and in entering judgment that she be remanded. From the testimony it appears that appellant is of Chinese parentage. She has been in China, with her mother, for 17 years. In such a case it cannot be said that any presumption arises that she was born in the United States. It, therefore, devolves upon her to prove to the satisfaction of the court that she was born in this country. It does not necessarily follow that, because four witnesses have testified positively that she was born in San Francisco, there being no witness to the contrary, their statements upon this question must be accepted as true. If such a rule were adopted and followed, there would be no more Chinese remanded in such cases. It is safe to say that the United States is powerless to make any proof in any case as to the place of birth of Chinese children. In the very nature of the case it would, as a general rule, be im-

possible to do so. The only protection to the government, in the enforcement of the exclusion act in this character of cases, lies in the cross-examination of each witness, on behalf of the petitioner, whereby the 'crucial test' of his credibility may be applied. It may or may not always be successful; but it has often been said to be one of the most efficacious tests which the law has devised for the discovery of truth.

"If, from the whole testimony, the court is not satisfied that the witnesses have told the truth, it has the right to exclude their testimony, and remand the petitioner, because the evidence offered is insufficient to convince the mind of the court that the petitioner is entitled to land in the United States."

In *Quock Ting vs. U. S.,* 140 U. S. 417, 420, 11 Sup. Ct. 733, 851, the court said:

"Undoubtedly, as a general rule, positive testimony as to a particular fact, uncontradicted by any one, should control the decision of the court; but that rule admits of many exceptions. There may be such an inherent improbability in the statements of a witness as to induce the court or jury to disregard his evidence, even in the absence of any direct conflicting testimony. He may be contradicted by the facts he states as completely as by direct adverse testimony; and there may be so many omissions in his account of particular transactions, or of his own conduct, as to discredit his whole story. His manner, too, of testifying may give rise to doubts of his sincerity, and create the impression that he is giving a wrong coloring to ma-

> aterial facts. All these things may properly be considered in determining the weight which should be given to his statements, although there be no adverse verbal testimony adduced."

It is urged by counsel for petitioner that the introduction of the report of the Board of Special Inquiry at the hearing at Manila, P. I., renders the hearings herein unfair and the competency of this unauthenticated copy of said record is also questioned.

We believe that it is now well settled by the decisions of this Court and those of other circuits as well as those of the United States Supreme Court that hearings before the Immigration officials are not governed by the strict rules of evidence that pertain to judicial proceedings.

> *Healy v. Backus,* 221 Fed. 358 (C. C. A. 9); *Choy Gum v. Backus,* 223 Fed. 487 (C. C. A. 9).

In the latter case the Court, speaking through his Honor Wolverton, District Judge, says:

> "This kind of testimony, while not ordinarily competent for judicial inquiry in the sense of a trial in a court of justice, has nevertheless been resorted to before executive officers and boards of immigration inspectors for determining the right of aliens to remain in this country, and yet the aliens have been refused their liberty upon habeas corpus, where the inquiry appeared to be fair and impartial, and where the immigration officials had been guilty of no

> abuse of discretion reposed in them. Such a case was Healy v. Backus, Commissioner of Immigration, 221 Fed. 358, recently decided by this Court. In that case many affidavits were taken and admitted, both for and against the petitioner, and a very wide range of inquiry was indulged in by which information was gathered by means of letters and reports, and yet the Court was of the view that the inquiry was fairly conducted toward the aliens whom Healy represented, and without abuse of discretion on the part of the immigration officers, and consequently refused to liberate them upon habeas corpus; there being pertinent testimony adduced from which the finding made could be reasonably inferred. To the same purpose are also the recently decided cases of White v. Gregory, 213 Fed. 768, 130 C. C. A. 282, in this court, and United States v. Uhl, 215 Fed. 573, 131 C. C. A. 641, in the Circuit Court of Appeals for the Second Circuit."

In the more recent case of *Morrell v. Baker,* 270 Fed. 577, decided in the Second Circuit, in a Per Curiam decision, the Court held as follows:

> "PER CURIAM. Hearings before administrative bodies, like the immigration authorities, are not subject to the rules governing judicial proceedings. The alien must be given a fair hearing, but the hearing may be summary. Hearsay evidence is admissible, and the findings of fact by the commissioners conclusive, if there is any evidence to support them. In re Diamond (C. C. A.), 266 Fed. 34; In re Rakies (C. C. A.), 266 Fed. 646.

> "In this case the alien had a fair trial, and there was evidence to support the finding that he had imported a woman for immoral purposes, and, that finding being binding upon us, the appeal is dismissed."

And again in the case of *Sibray v. United States,* 227 Fed. 1, 7, decided by the Circuit Court of Appeals for the Third Circuit, the Court, says:

> "The act of 1907 contemplates a summary investigation, and not a judicial trial, and while an alien's right to be heard must be respected, and the discretion of the officials must not be abused, the formalities of procedure and the rules governing the admissibility of evidence have been much relaxed. U. S. v. Uhl (C. C. A., 2d Cir.), 215 Fed. 573, 131 C. C. A. 641; Choy Gum v. Backus (C. C. A., 9th Cir.), 223 Fed. 492,—C. C. A.—. We do not find anything fatally erroneous in the present record. The alien had counsel from the beginning, and had the opportunity to call such witnesses as he wished or was able to produce."

In the case of *Tang Tun v. Edsell,* 223 U. S. 673; 56 L. ed. 606, it was there held that the report of the examining inspector, who inspected various records relating to the applicant for admission, was competent and admissible unless it was shown that said report was false or made to deceive the Secretary. In this case the Court says:

> "And it will be observed that it is not shown that the statements of the inspector, of which complaint is made, were false, or that there

was any attempt to deceive the Secretary. * * *"

"Complaint is also made of the action of the inspector in forwarding to the Secretary the papers in the cases of other Chinese persons who arrived on the steamer 'Tacoma' with Tang Tun on April 10, 1897, some of whom had identification papers similar to those of Tang Tun, with the indorsement of the collector, purporting to show their admission, in conflict with the office records. The inspector called attention to the fact that, in certain cases, after inquiry before the United States Commissioner, and despite the possession of such identification papers, deportation had been ordered, and also that it appeared that all the applicants described in the papers forwarded to the Secretary had been held in British Columbia pending decision. The contents of these papers are not printed in the transcript of record, but we must assume from the description that they were from the official files. Of these the Secretary might at all times take cognizance, and it would be extraordinary indeed to impute bad faith or improper conduct to the executive officers because they examined the records or acquainted themselves with former official action."

"The record fails to show that their authority was not fairly exercised, that is, consistently with the fundamental principles of justice embraced within the conception of due process of law. And, this being so, the merits of the case were not open to judicial examination."

"As the District Court took jurisdiction and then proceeded to determine the merits, sus-

taining Tang Tun's claim of citizenship, the respondent was entitled to carry the entire case to the Circuit Court of Appeals. United States v. Jahn, 155 U. S. 109, 39 L. ed. 87, 15 Sup. Ct. Rep. 39; Spreckels Sugar Ref. Co. v. McClain, 192 U. S. 397, 407, 48 L. ed. 496, 499, 24 Sup Ct. Rep. 376; United States v. Ju Toy, 198 U. S. 253, 259. 49 L. ed. 1040, 1042, 25 Sup. Ct. Rep. 644. And the judgment of that court, reversing the decision of the District Court, and directing the dismissal of the proceedings, was right.

"Judgment affirmed."

There are other discrepancies and contradictions in the records which are pointed out in the memorandum of the Acting Secretary heretofore referred to.

It does not necessarily follow that because the citizenship of the alleged father C. Wai Tong is conceded, that the appellants herein are also citizens of the United States and therefore entitled to admission as such.

The record shows that the alleged father was born in China, November 20, 1857 (Exhibit A, p. 20), and that Chang Yet and Chang Sim were also born in China in KS 13-11-24 (January 7, 1888) and KS 20-8-2 (September 1, 1894), respectively (Exhibit A, p. 19).

It further appears from the records that C. Wai Tong became a citizen of the Hawaiian Kingdom

by naturalization July 19, 1892 (Exhibit C, pp. 11 and 14).

The annexation of Hawaii was followed by the enactment of the law of April 30, 1900 (31 Stat. L. 141; Comp. Stat. 1918, Section 3647) Section 4 of which Act provides as follows:

> "All ~~children heretofore born or hereafter~~ persons who were citizens of the Republic of Hawaii on August 12, 1898, are hereby declared to be citizens of the United States and citizens of the Territory of Hawaii."

Section 1993 of the Revised Statutes (Comp. Stat. 1918, Section 3947) provides as follows:

> "Al children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States."

It will be observed that neither of the appellants herein come within the provisions of either of the above quoted Acts.

The alleged father C. Wai Tong did not become a citizen of the United States until after the passage of the Act of April 30, 1900, and was not therefore a citizen of the United States at the time of the birth of either of the appellants herein, or, in other words, until Chang Yet, who was born in 1888, was twelve years of age and Chang Sim, who was born in 1894, was six years old.

This fact alone fully justifies the action of the

Acting Secretary in dismissing the appeal in these cases.

But because of the character of the evidence and the contradictions and discrepancies therein, the Board of Special Inquiry and the Secretary of Labor were called upon to exercise a discretion in the determination of the matter before them. In the exercise of this discretion they could have decided either in favor of or against the applicants, and there being some evidence in support of that decision, their reasons for so doing would not be subject to judicial review by the Court.

Abuse Justifying Interference.

"The 'abuse of discretion', to justify interference with the exercise of discretionary power, implies not merely error of judgment, but perversity of will, passion, prejudice, partiality or moral delinquency. 29 Ind. A. 395; 62 N. E. 107-111." 1 C. J., 372.

"The exercise of an honest judgment, however erroneous it may appear to be, is not an abuse of discretion. Abuse of discretion and especially gross and palpable abuse of discretion, which are terms ordinarily employed to justify an interference with the exercise of discretionary power, implies not merely error of judgment, but perversity of will, passion, prejudice, partiality or moral delinquency. 29 N. Y. 418, 431." 1 C. J., 372.

"Difference in judicial opinion is not synonymous with abuse of judicial discretion. 62 N. J. L. 380, 383." 1 C. J., 372.

This Court, speaking through his Honor, Morrow, C. J., in *White v. Gregory,* 213 Fed. 768-770, says:

> "In reaching this conclusion the officers gave the aliens the hearing provided by the statute. This is as far as the Court can go in examining such proceedings. It will not inquire into the sufficiency of probative facts, or consider the reasons for the conclusions reached by the officers."

In the recent case of *Jeung Bock Hong and Jeung Bock Ning v. White,* 258 Fed. 23, the Court, speaking through his Honor, Morrow, C. J., said:

> "The discrepancies in the testimony appear to be unimportant but if taking them altogether the executive officers of the Department found that the evidence in support of the petitioner's right to land and enter the United States was so impaired as to render it unsatisfactory, the Court is not authorized to reverse that conclusion."
>
> "We canot say that the proceedings were manifestly unfair or that the actions of the executive officers were such as to prevent a fair investigation or that there was a manifest abuse of the discretion committed to them by the statute. In such cases, the order of the executive officers within the authority of the statute is final."

In *Low Wah Suey v. Backus,* 225 U. S. 460 (56 L. ed. 1167), the Court, speaking through Mr. Justice Day, says:

"A series of decisions in this Court has settled that such hearings before executive officers may be made conclusive when fairly conducted. *In order to successfully attack by judicial proceedings the conclusions and orders made upon such hearings, IT MUST BE SHOWN THAT THE PROCEEDINGS WERE MANIFESTLY UNFAIR, THAT THE ACTION OF THE EXECUTIVE OFFICERS WAS SUCH AS TO PREVENT A FAIR INVESTIGATION, OR THAT THERE WAS A MANIFEST ABUSE OF THE DISCRETION COMMITTED TO THEM BY THE STATUTE.* In other cases the order of the executive officers within the authority of the statute is final. U. S. v. Ju Toy, 198 U. S. 253, 49 L. ed. 1040, 225 Sup. Ct. Rep. 644; Chin Yow v. U. S., 208 U. S., 8 L. ed. 369, 28 Sup. Ct."

We confidently urge and believe that the judgment of the lower court in this case should be affirmed.

Respectfully submitted,

JOHN T. WILLIAMS,
United States Attorney,

BEN F. GEIS,
Assistant United States Attorney.